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Dwight C. Adams

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PARTIES AND INTERESTED PERSONS UNDER THE ILLINOIS DEAD MAN'S ACT

The Illinois Evidence and Depositions Act provides that,
No party to any civil action, suit or proceeding or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending . . . .

The aforementioned section of the Evidence and Depositions Act has been cause for much misunderstanding and confusion, largely resulting from the varying judicial constructions which have been given to the words party and person directly interested. A person who falls into these two classes of witnesses is deemed incompetent to testify when "any adverse party sues or defends" in one of the enumerated "protected" capacities. It is the purpose of this section to analyze the classes of witnesses which have been deemed to be parties or persons directly interested, thus disqualifying them from testifying.

WHO IS A PARTY?

The definition of "party" generally used by the courts in the application of the Dead Man's Act is:

[A]ll persons who have a direct interest in the subject matter of the suit and have a right to control the proceedings, make defense, examine witnesses and appeal if an appeal lies.

Other considerations are also important. Simply naming a person in a complaint will not make him a party in the sense contemplated by the Dead Man's Act. To be a party, the person must be subject to the jurisdiction of the court hearing the case. If the court is without jurisdiction over the person, because, for example, the person was not properly served, he is not a party. Thus, in Sankey v. Interstate Dispatch, a wrongful death suit was filed against the owner of a truck and his driver. However, only the owner was served with process. The court held that the driver was not a

2 A protected party under the Dead Man's Act is one suing or defending in one of the capacities listed in section 2, i.e., as executor, administrator, heir, legatee or devisee of any deceased person; or as guardian or trustee of any such heir, legatee or devisee of any deceased person.
3 Words and Phrases, "Parties."
party to the action and thus was not rendered incompetent to testify in behalf of the owner of the truck.

However, if a party is served and later defaults he nevertheless continues to be incompetent as a witness when an adverse party sues or defends in one of the enumerated protected capacities. Cairo & St. Louis R.R. Co. v. Holbrook\(^5\) illustrates this principle well. In that case, a contract action was filed against the defendant for work and labor performed. The defendant was served, but failed to appear. The court heard evidence offered by the plaintiff as to damages, and judgment was entered. Thereafter, on the defendant's motion the case was reopened on the grounds that the defendant was not notified as to the court date when damages would be assessed. The court held that although the defendant could not contest a finding on the merits of the case, he could introduce evidence as to damages and cross-examine the plaintiff's witnesses on this issue. Although this case was not decided under the Dead Man's Act, it still indicates that even when a party is defaulted he still occupies in some measure the characteristics of any other party and for that reason would be incompetent to testify if the adverse party had sued or was defending in one of the enumerated protected capacities.

A person who is a party to a law suit in which the adverse party is suing or defending in a protected capacity must be a *proper* party. If not, the mere naming of the person in the complaint will not render him incompetent. A *proper* party is one who has some direct interest in the results of the suit. He stands to lose or gain by the decision. Thus, in Northern Trust Co v. Sanford,\(^6\) a suit to foreclose a purchase money mortgage, the janitor of the building was made a defendant. The court held that he was not necessarily incompetent to testify to a defense of fraud. The court can look to see whether or not the party has an actual interest in the result. In the Sanford case, the court indicated that the janitor was made a party defendant only because he was in charge of the building and collected the rents. He was not shown to have an actual interest in the building and thus had no actual interest in the outcome of the suit.

The motive for naming a person as a party will not affect the determination of incompetence. If the party is, in fact, properly named as a party, he will be disqualified as a witness if the adverse party is suing or defending in one of the enumerated protected capacities. In Sullivan v. Corn Products Refining Co.,\(^7\) a wrongful death action, the defendant's foreman was made a co-defendant primarily for the purpose of rendering him incompetent to testify. The foreman was the one who had ordered the deceased into a grain dryer to repair it. The dryer was in an unsafe condition at the time. The

\(^5\) 72 Ill. 419 (1874).  
\(^6\) 308 Ill. 381, 139 N.E. 603 (1923).  
court held that merely because one is joined as a defendant in order to prevent his testifying in behalf of his co-defendant is of no consequence. The foreman was a proper party and was thus incompetent.

Once a person ceases to be a party by reason of dismissal, his status as a party ceases and the reason for his incompetency is also terminated. He is thereafter allowed to testify. This is illustrated in *Hawthorne v. New York Central R.R. Co.* In that case, the deceased was hit by a train and the fireman on the train was made a defendant. Subsequently, the fireman was dismissed. Notwithstanding the dismissal, the trial court refused to allow the fireman to testify. On appeal, the court held that if a witness ceases to have an interest in the result of the proceeding, in this case because he ceased to be a party, then he is no longer incompetent to testify against the protected party.

Likewise, in *Webb v. Willett Co.*, an action was brought by the administratrix of the estate of William D. Webb for damages suffered by his widow and two sons from his wrongful death in an automobile accident. The suit was originally commenced against both the Willett Co. and its employee, Krett. The trial court found for the plaintiff as to the action against Krett, but directed a verdict in favor of Willett Co., stating that Krett was not acting within the scope of his employment at the time of the occurrence. On appeal, this decision was reversed and a new trial ordered. At the second trial, the defendant, Willett Co., attempted to take testimony from Krett. The plaintiff objected, on grounds that Krett was a party to the action. The trial court sustained the objection, but on appeal the decision was reversed. The court held that “incompetency is removed by the prior judgment in the same manner as though the suit had been dismissed or never commenced against the defendant called as a witness.”

Thus, it is clear that the mere designation of a person as a party will not be controlling. The courts will look to see whether or not the witness is a proper party and continues to be so at the time he seeks to testify. Therefore, the attorney must be certain that all parties are properly served and are not prematurely dismissed, for otherwise they will be competent to testify, absent any direct interest in the outcome of the suit.

**Requirement of Adversity of a Party in Order To Be Incompetent To Testify**

A party is only incompetent to testify when an adverse party sues or defends in a protected capacity. That is to say, a party is precluded from testifying when he would derive some advantage from the outcome of the

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8 The statement in the text is true unless the witness is disqualified on other grounds, such as having an interest in the results of the proceedings.


10 309 Ill. App. 504, 33 N.E.2d 636 (1st Dist. 1941).

11 Id. at 510, 33 N.E.2d at 638.
suit to the detriment of the party who stands in one of the protected positions by virtue of the Act. Whether the party who is seeking to testify is a plaintiff or defendant in the action is immaterial. The only matter of significance is that his position is directly opposite the protected party. Thus, if a party would take less under a will then he would by the laws of descent and distribution he would be allowed to testify in favor of the will. In such an instance, his position would not be in opposition to the one held by the executor—the protected party.\(^\text{12}\)

The position of a party on the same side of the law suit as the protected party will also not be a determinative factor in deciding whether or not adversity is present. Equity will look to substance rather than form to ascertain on which side of a controversy a witness' real interest lies—the so-called doctrine of "equitable alignment." The willingness of the court to employ the doctrine of equitable alignment was demonstrated well in the case of *Mernick v. Chiodini*,\(^\text{13}\) a wrongful death action, wherein a defendant was held incompetent when he attempted to testify against the interests of an administrator-co-defendant. It would have been to the advantage of the defendant to have judgment entered against the estate. In that case, the administrator of the estate of a passenger killed as a result of a head-on crash with a truck, brought an action against the estate of the driver of the car, who was also killed in the crash, and the driver of the truck. Named as a third defendant was the driver of a third car whose sudden stop was alleged to have been the proximate cause of the accident. The administrator of the deceased passenger's estate called as his witnesses the driver of the truck and the driver of the third car, both of whom were defendants along with the administrator of the estate of the driver of the car in which the plaintiff's decedent was a passenger. In determining the competency of the truck driver and the driver of the third car, the court noted that it was possible for the estate of the driver of the decedent-passenger's car to be found solely liable, completely exonerated, or liable jointly with one or more of the other defendants. Thus, each of the defendants were interested in avoiding liability and would seek to place the blame on the other. Their respective interests were therefore adverse to the administrator of the estate of the deceased driver notwithstanding the fact that they were all on the same side of the law suit. They were thus precluded from testifying.\(^\text{14}\)

Similarly, in *Pyle v. Pyle*,\(^\text{15}\) the defendant in a will contest could have taken either as devisee or heir, but would have taken more as an heir. She was held to be adverse to the position of her co-defendants, the executor

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12 See Brownlie v. Brownlie, 351 Ill. 72, 183 N.E. 613 (1932).
15 158 Ill. 289, 41 N.E. 999 (1895). See also Bordell v. Brady, 172 Ill. 420, 50 N.E. 124 (1898).
and other devisees. She was thus incompetent to testify against the will at the instance of the plaintiff-contestants.

On the other hand, in Brownlie v. Brownlie, another will contest, the defendant-legatees were allowed to testify. In that case, the legatees were called as witnesses by the contestant. Their testimony was objected to as incompetent by other legatees, also defendants in the matter. The trial court sustained the objection. However, on appeal, the trial court's decision was reversed. The court pointed out that the legatee whose testimony was in question would have taken less as an heir than as a legatee and thus his interest was not adverse to the other legatees.

In short summary, it is evident that the court will disregard such matters as the formal naming of the parties as either plaintiff or defendant when the issue of adversity is present. If the court has determined that a witness who is a co-party with the protected party has an interest which would cause him to gain or lose as a direct result of the suit and such interest is in conflict with that of the adverse protected party, then the court will realign his position and declare him incompetent to testify. However, if the court has determined that the interest of the witness is one that will not result in a gain or loss from the outcome of the suit, but is still an interest that is in conflict to that of his co-party (the protected party), then the court will not render that witness incompetent but rather will hold that his testimony only goes to affect his credibility.17

**Who Is a Person Directly Interested?**

As previously discussed, a party to an action is incompetent to testify when any adverse party sues or defends in one of the enumerated protected capacities. However, even though a person is not a party to the action he may be placed at some advantage or disadvantage because of the outcome of the proceedings; that is, he may be a "person directly interested . . . ."

What constitutes an interest sufficient to render one incompetent? Briefly stated, the interest must be direct. The person involved must either gain or lose as a direct result of the action. It is not enough that an interest is speculative and remote. Thus, in Paschell v. Reed,18 the court said

\[T\]he interest which will disqualify a witness to testify . . . must be legal, certain, and immediate interest, and such interest must be direct, certain, and vested. Otherwise it does not disqualify him and the interest in such event goes only to the credibility of the witness and not to the competency of such witness.19

10 Supra note 12.
17 Wetzel v. Firebaugh, 251 Ill. 190, 95 N.E. 1085 (1911). See also Campbell v. Campbell, 130 Ill. 466, 22 N.E. 620 (1889).
19 Id. at 395, 51 N.E.2d at 344.
In the *Paschell* case, the plaintiff called as witnesses parties who were sureties on the bond the plaintiff was required to supply when she appealed from the county court to the circuit court. The defendant insisted that these witnesses were disqualified because they might be liable for court costs. In finding that these parties were not directly interested in the proceedings, the court stated:

> It was not certain that plaintiff would be required to pay costs even though judgment should have gone against her on her claim and such judgment would not thereby have become the direct obligation of the sureties. . . . There was, therefore, no direct liability upon such persons and they were clearly competent witnesses to testify in this case.\(^{20}\)

Similarly, in *Williams v. Gavin*,\(^ {21} \) the court declared that an interest which would mean profit to a witness only if he outlived the heirs of an estate and if they did not dispose of the property in their lifetime was not a direct interest, and the witness was allowed to testify.

An additional requirement to render one incompetent is that the interest must exist at the time of the suit. A prior interest, no longer present, will not disqualify a witness. Thus, in *First Nat'l Bank v. Sandmeyer*,\(^ {22} \) a former stockholder was allowed to testify adverse to the position of the protected party. The court held that though he may have had an interest in the outcome at the time the cause of action arose, since he was no longer a stockholder, he no longer had an interest.

What is the nature of the direct interest which will cause the incompetency? As stated, the test used is whether or not the witness will gain or lose as the direct result of the suit. However, the gain or loss must be of a pecuniary nature, not the mere satisfaction with the results of the suit.\(^ {23} \)

What, however, has been considered a sufficient pecuniary interest in the proceedings to render a party incompetent to testify? In *Cutwright v. Preacher's Aid Society*,\(^ {24} \) the deceased had made a note payable on his death to a fund for retired and disabled ministers and their widows. When the beneficiaries of the fund were made witnesses for purposes of authenticating the note, the court held them incompetent, stating they had an interest in the outcome of the proceedings.

A stockholder of a corporation also has a sufficient pecuniary interest to disqualify him from testifying. In *National Woodenware & Cooperage*
Co. v. Smith, an employee of the defendant corporation was killed as a result of a defective boiler. A stockholder of the defendant corporation was called as a witness by the defendant to show that the plant was operated in a safe manner. He was held incompetent to give such testimony on the ground that he had an interest in the results in the suit. The Smith decision may be questioned today in light of the fact that so many employees own minor shares of stock in the corporations for which they work. Can it be said that they truly have an interest in the outcome of the suit? If a major shareholder were involved there would be no question that he has a sufficient interest, but it is submitted that the same is not true in the case of minor shareholders.

In contradistinction to the above mentioned cases, it has been held that an inchoate right of dower is not such an interest as to render a person incompetent, and in another case it was held that members of a church could testify to the validity of a will in which the church was a beneficiary.

It thus is not always clear when a court will disqualify a witness because of the pecuniary nature of his interest. Clearly, however, it can be said that the interest must be of a direct and immediate nature. The courts have held that the mere fact that the witness himself may be subsequently sued for the same cause of action will not render him incompetent as a person directly interested. Thus, in Martin v. Stransenback, a guest in an automobile was injured by a collision with another car. He sued the driver of the other car and called as his witness the driver of the car in which he had been riding. The court held that the witness was competent to testify. The court concluded that even though the guest might still bring an action against his host, the host had no interest in the judgment recovered by the guest from the other driver.

It has been held that mere relationship between the witness and an adverse party will not be enough, standing alone, to render a person incompetent. Therefore, an agent, attorney, employee or a partner is not considered incompetent merely because of his status in relation to a party who is adverse to the protected party. In Johnson v. Matthews, for example, the court held that the real estate agent of the defendant was not disqualified from testifying against the executor of the decedent's estate. That case was an action founded in contract, based upon a promissory note. The plaintiff died during the pendency of the action and his executor was substituted. The

26 Heineman v. Herman, 385 Ill. 191, 52 N.E.2d 263 (1944). However, if the party having an inchoate right of dower has a spouse who has been declared incompetent, that party will also be considered incompetent. Greenwood v. Commercial Nat'l Bank of Peoria, 7 Ill. 2d 436, 130 N.E.2d 75 (1952).
27 Adams v. First M.E. Church of Irving Park, 251 Ill. 268, 96 N.E. 253 (1915).
30 301 Ill. App. 2d 295, 22 N.E.2d 772 (1st Dist. 1939).
defendant called as his witness the real estate agent, who stated that he had procured a release of the plaintiff's obligation on the defendant's property and that the note was satisfied. The executor contested the agent's right to testify. The court held that "the interest which disqualifies a witness from testifying . . . must be an actual financial interest that will result in pecuniary gain or loss for the witness."31

Similarly, it has been held in Slape v. Fortner,32 that an attorney's interest in the financial success of his client is not sufficient to disqualify him as a witness. In that case, the witness had been the legal advisor for the parties in interest and had prepared the final draft of their contract. The court found no reason to exclude the attorney's testimony. He had nothing to gain or lose from the outcome of the suit.

Family relationships, in and of themselves, will not disqualify a witness from testifying.33 Only if the relative is a party to the action or has a financial and legal interest in the outcome will he be precluded from testifying.34

The mere fact that a prospective witness may be an heir or devisee of the decedent will not render him incompetent unless the result of the action will directly affect him. Thus, in Hochersmith v. Cox,35 the granddaughter of the testatrix was not a party to a will contest and could neither gain nor lose as a direct result of the suit. She was found to be competent to testify.

**Court's Witness Procedure**

In some cases the courts may modify the strict rule that parties and interested persons are not competent to testify against the protected party. The court may rely on section 183 of the Probate Act36 and make the otherwise incompetent witness the court's witness. This section is only applicable where the representative of an estate brings the action against someone withholding assets claimed by the estate. The pertinent part of the statute provides:

[T]he court may examine the respondent . . . may determine all questions of title, claims of adverse title, and the right of property, and may enter such orders and judgment as the case requires.

Thus, in Wagner v. Wagner,37 a citation proceeding, the defendant, under the general rules of the Dead Man's Act, would have been incom-

31 Id. at 297, 22 N.E.2d at 773.
petent to testify. In that case, the defendant was the son of the decedent. In question was the alleged partnership between the two. By making the son the court's witness, the necessary facts as to the partnership could be elicited and the Dead Man's Act by-passed.

Dwight C. Adams